IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. JAMICHAEL J. BAILEY, Appellant.	)	DIVISION ONE No. 55047-1-I **UNPUBLISHED OPINION** FILED: June 19, 2006

PER CURIAM. – Jamichael Joseph Bailey was convicted of vehicular assault. He challenges the sufficiency of the evidence, jury instructions defining "disregard for the safety of others," and the validity of the court's restitution order. We affirm because there was sufficient evidence to convict Bailey, the jury instructions were legally accurate and provided the jury with an ascertainable standard, and orders of restitution do not require a jury finding of amounts owed.

Bailey got in his car one sunny but brisk morning and noticed that his windows were "totally fogged up." He turned on his defroster, which was blowing cold. When the defroster had made "a little hole" in the front windshield, Bailey

began driving. He could not see at all out of his left or right windows, or out of the back, but he did not wipe any windows down, nor did he wait for them to clear. He headed for the freeway, believing that once he got there, the defroster would work a little better.

When Bailey reached a controlled, flat intersection with good visibility, he turned left going about 25 miles per hour. He hit Ted Zeltner, who was in the crosswalk. Zeltner was 70 years old at the time and walked slowly with crutches due to menengitis. Zeltner had the right of way, and three eyewitnesses saw him clearly in the crosswalk just before the collision. Bailey did not see Zeltner at any time before the impact. Zeltner was seriously injured.

At trial, Bailey was honest about his actions but argued that the collision was a "tragedy" that did not rise to the level of a criminal offense. He blamed his lack of driving experience, and claimed that he did not "realize the full impact" of his decision not to wipe down the windows. Bailey was convicted of vehicular assault under RCW 46.61.522(1)(c).[1] As a first time offender, he was sentenced to one day with time served and ordered to pay restitution to Zeltner. He appealed.

Sufficiency of the Evidence

When reviewing a challenge to the sufficiency of the evidence, the court considers the evidence in the light most favorable to the prosecution and

[1] "A person is guilty of vehicular assault if he or she operates or drives any vehicle: . . . With disregard for the safety of others and causes substantial bodily harm to another." RCW 46.61.522(1)(c).

determines whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[2] The prosecution's evidence and all reasonable inferences from it are presumed true.[3] The court defers to the trier of fact to resolve any conflicts in testimony, weigh the persuasiveness of evidence, and assess the credibility of the witnesses.[4]

Bailey argues that the evidence was insufficient to show that he consciously disregarded the danger of driving with foggy windows. He cites State v. Lopez,[5] in which vehicular homicide charges against an unlicensed, underage driver were dismissed because violation of the licensing statute, without more, did not establish the mens rea "disregard for the safety of others."[6] The State appealed, but Division Three affirmed, holding that "[s]ome evidence of the defendant's conscious disregard" of the danger posed by unlicensed driving was necessary to support the charge.[7]

But Bailey himself testified that he was aware that his windows were totally fogged up when he got in the car. He did not make any attempt to wipe

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[2] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)) (emphasis omitted).

[3] State v. Wilson, 71 Wn. App. 880, 891, 863 P.2d 116 (1993), rev'd on other grounds, 125 Wn.2d 212, 883 P.2d 320 (1994).

[4] State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964 (1998).

[5] 93 Wn. App. 619, 970 P.2d 765 (1999).

[6] Lopez, 93 Wn. App. at 622. The reasoning of vehicular homicide cases interpreting "disregard for the safety of others" is applicable to vehicular assault cases. In 2001, the Legislature amended RCW 46.61.522 to include this language from RCW 46.61.520, the vehicular homicide statute. Laws 2001, ch. 300, § 1 (2001).

[7] Lopez, 93 Wn. App. at 623.

them down so he could see. He turned on his defroster, and was just trying to get to the freeway in the hope that his defroster would work better once his car warmed:

> I thought that, you know . . . if I could see where I'm going, just a little bit, once I get on the freeway, everything else will take care of itself. Everything was going to thaw out and stuff by the time I got on the freeway.

Bailey also testified that he could see through "a peephole" in the front windshield, but could not see out the left, right, or back windows of the car at all. He admitted that he would not drive a car blindfolded, so Bailey knew the danger of driving with obscured vision despite his lack of driving experience.

Bailey's testimony is substantial evidence that he knew of the risk of driving with obscured vision, and disregarded that danger. He could not see at all out of his left window, and while making a left hand turn he hit a full-grown man, walking slowly with crutches, in a well-marked crosswalk, at a flat intersection, on a sunny morning. There was substantial evidence to support the jury's conclusion that Bailey drove with disregard for the safety of others and injured Zeltner as a result.

Jury Instructions

The question of whether a jury instruction accurately states the law is reviewed de novo.[8] The trial court may answer questions posed by the jury during deliberations; questions, objections, and any response by the court must

[8] Blaney v. Int'l Ass'n of Machinists & Aero. Workers, Dist. No. 160, 151 Wn.2d 203, 210, 87 P.3d 757 (2004).

be part of the record.[9] Bailey argues that the definition of "disregard for the safety of others" in the jury instructions and the court's response to jury inquiries denied him due process.

Bailey's first argument is that the jury had no ascertainable standard to differentiate "disregard for the safety of others" from ordinary negligence. Jury instruction 11 defined the phrase as worse than negligence, but less severe than recklessness:

> Disregard for the safety of others means an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than ordinary negligence. Ordinary negligence is the failure to exercise ordinary care. Ordinary negligence is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances. Ordinary negligence in operating a motor vehicle does not render a person guilty of vehicular assault.

Recklessness was defined in a separate instruction as "to drive in a rash or heedless manner, indifferent to the consequences."

Our Supreme Court has held the language of instruction 11 to be constitutionally sound,[10] and Bailey does not dispute that holding. He argues instead that the court's response to a jury inquiry defining "aggravated" as "worse or more severe" rendered instruction 11 subjective.

Bailey's argument is not persuasive. He fails to explain why "worse or

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[9] CrR 6.15(f)(1).

[10] State v. Eike, 72 Wn.2d 760, 766, 435 P.2d 680 (1967). See also State v. May, 68 Wn. App. 491, 496, 843 P.2d 1102 (1993) (citing State v. Jacobsen, 78 Wn.2d 491, 498, 477 P.2d 1 (1970)).

more severe" is not a proper definition of "aggravated." It is.[11] He also does not explain why "aggravated" is objective and constitutionally sound but "worse or more severe" is not. State v. May[12] is inapposite. In that case, the trial court provided indistinguishable definitions of "driving in a reckless manner" and "driving with disregard for the safety of others":

> Instruction 6, taken from WPIC 90.05, defined driving in a reckless manner as "driving in a rash or heedless manner, indifferent to the consequences," and defined driving with disregard for the safety of others as driving with "a heedless indifference to the probability that injury to one or more other persons will result."[13]

Nothing like that happened here. Instruction 11 distinguished between "ordinary negligence" and "disregard for the safety of others," and was a legally accurate description of the standard. The instructions, including the court's response, properly placed the legal standard between negligence and recklessness.

Bailey next contends that "conscious disregard of the risk" is part of the mens rea for vehicular assault, and that the phrase should have been included in the jury instructions. The omission of "conscious disregard for the risk," he argues, relieved the State of its burden to prove all elements of the crime as due process requires.

Bailey has no authority for his assertion; the cases he cites turn on whether there was substantial evidence of conscious disregard, not whether the

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[11] "Aggravated" is defined as "made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime." Black's Law Dictionary 71 (8th ed. 2004).

[12] 68 Wn. App. 491, 843 P.2d 1102 (1993).

[13] May, 68 Wn. App at 496.

phrase was included in the jury instructions.[14] Bailey also does not explain how, in the context of the jury instruction definition, "disregard for the safety of others" is a separate element from "conscious disregard of the risk." "Disregard" is defined as "[t]he action of ignoring or treating without proper respect or consideration."[15] One cannot ignore or mistreat something without first being conscious of it. And "risk" is a synonym of "danger."[16] Again, the language of this jury instruction has been held to be constitutionally sound.[17]

Even assuming arguendo that the jury instruction should have included this phrase, and due process was violated, the error was harmless. A harmless error under the constitutional standard occurs if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.[18] As explained above, Bailey admitted in court that he disregarded the risk of driving with fogged windows. The State was required to prove, and did prove, that Bailey consciously disregarded the risk.

Restitution

Bailey argues that the restitution order violated Blakely v. Washington[19] because the court, not the jury, made factual findings regarding Zeltner's

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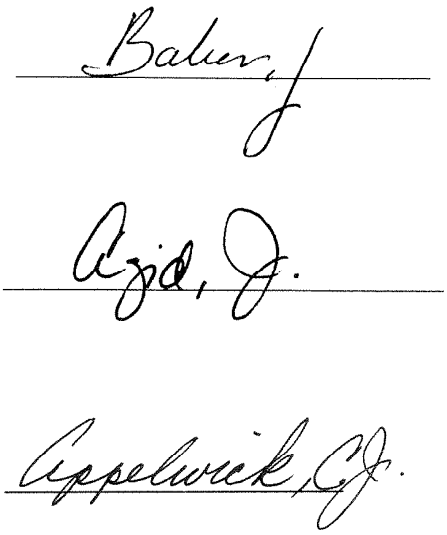
[14] State v. Vreen, 99 Wn. App. 662, 672, 994 P.2d 905 (2000), aff'd, 143 Wn.2d 923, 26 P.3d 236 (2001); Lopez, 93 Wn. App. at 623.
[15] Black's Law Dictionary 506 (8th ed. 2004).
[16] Webster's Third New International Dictionary 573 (1993).
[17] Eike, 72 Wn.2d at 766.
[18] State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).
[19] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

financial losses. When the briefs in this case were filed, our Supreme Court was

considering whether Blakely required a jury finding of fact regarding amounts ordered to be paid in restitution.[20] The answer is no.[21] Bailey's argument fails.

AFFIRMED.

FOR THE COURT:



[20] State v. Kinneman, 155 Wn.2d 272, 277-78, 119 P.3d 350 (2005).
[21] Kinneman, 155 Wn.2d at 282.